

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRIS PURTILL,

Petitioner,

v.

PATRICK COVELLO,

Respondent.

No. 2:22-cv-0199 KJM DB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges his convictions for lewd and lascivious conduct on a child imposed by the Sacramento County Superior Court in 2017. Before the court are respondent's motion to dismiss the petition as untimely and because one claim is unexhausted, petitioner's motion to stay these proceedings, and petitioner's request for DNA testing of trial evidence. For the reasons set forth below, this court will recommend respondent's motion to dismiss be granted because the petition is untimely. This court further recommends that petitioner's motions to stay and for DNA testing be denied as moot.

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BACKGROUND

After a jury trial, on October 26, 2017, petitioner was convicted on seven charges of lewd and lascivious conduct on a child. (ECF No. 13-1.¹) On November 28, 2017, the superior court sentenced him to a determinate state prison term of twelve years. (*Id.*) On June 18, 2019, the California Court of Appeal affirmed the judgment. (ECF No. 13-2.) The California Supreme Court denied review on August 21, 2019. (ECF Nos. 13-3, 13-4.)

Petitioner filed four habeas petitions in state court:²

1. Petition filed August 25, 2019³ in Sacramento County Superior Court. The Superior Court denied the petition in a reasoned opinion on October 9, 2019. (ECF Nos. 13-5, 13-6.) The Superior Court denied petitioner's motion for reconsideration on January 13, 2020. (ECF Nos. 13-7, 13-8.)

2. Second petition filed September 3, 2020 in the California Court of Appeal.⁴ The Court of Appeal denied the petition without comment on September 18, 2020. (ECF Nos. 13-9, 13-10.)

3. Third petition filed July 21, 2021 in the California Supreme Court. The California Supreme Court denied the petition on October 13, 2021 in a brief order: “The petition for writ of habeas corpus is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence]; *In re Dixon*

¹ Respondent lodged relevant portions of the state court record. (See ECF No. 13.) This court refers to those documents by their electronic filing numbers.

² Respondent provides copies of these state court filings. Petitioner does not indicate that he filed any additional state court petitions or that the state records provided are not correct. Based on the absence of any dispute regarding these documents, the court may take judicial notice of them. See Fed. R. Evid. 201(b).

³ Because petitioner was incarcerated when he filed his state and federal habeas petitions, he is entitled to the benefit of the “mailbox rule.” See Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir. 2010). Under the mailbox rule, a prisoner’s submission to the court is deemed filed on the date they provide it to the prison for mailing. Id. at 1058-59.

⁴ The post-conviction process in California requires a petitioner to file original habeas petitions in each successive court. See Flemming v. Matteson, 26 F.4th 1136, 1144 (9th Cir. 2022). A petitioner in California does not appeal the denial of a habeas petition by a lower court.

1 (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus claims that could have been,
2 but were not, raised on appeal].)" (ECF Nos. 13-11, 13-12.)

3 4. Fourth petition filed January 21, 2022 in the Sacramento County Superior Court. The
4 Superior Court denied it on March 10, 2022. (ECF Nos. 13-13, 13-4.)

5 Petitioner filed the present habeas petition in this court on January 23, 2022. (ECF No. 1.)
6 He alleges he was denied a fair trial because: (1) jurors saw him entering the courtroom in
7 handcuffs and with a police escort; (2) evidence was not subjected to DNA testing; (3) his trial
8 attorney failed to seek to exclude the testimony of the minor victim regarding the effects of the
9 medication Adderall; and (4) appellate counsel failed to raise ground (1) on appeal.

10 Respondent seeks to dismiss the petition because it is untimely. Respondent further
11 contends dismissal is required because the petition contains an unexhausted claim. (ECF No. 11.)
12 Petitioner concedes that one claim is unexhausted but otherwise opposes the motion. (ECF No.
13 22.) Respondent filed a reply (ECF No. 24).

14 Petitioner seeks a stay of these proceedings to permit him to complete exhaustion of his
15 state remedies for the unexhausted claim. (ECF No. 16.) Respondent filed an opposition to the
16 motion to stay (ECF No. 19) and petitioner filed a reply (ECF No. 26). Petitioner also filed a
17 document identified in the docket as a first amended petition. (ECF No. 18.) While petitioner
18 filed the document on the standard form for a habeas corpus petition, it is apparent he did not
19 intend to amend his petition. Rather, in that document petitioner requests DNA testing of
20 evidence introduced at trial.

21 MOTION TO DISMISS

22 Respondent first argues the petition is untimely. Respondent contends petitioner is not
23 entitled to sufficient tolling of the statute of limitations during his state proceedings because he
24 unreasonably delayed filing petitions in the California Court of Appeal and the California
25 Supreme Court. Respondent next argues that petitioner failed to exhaust ground 2. Therefore,
26 respondent contends, the petition should be dismissed because it contains both exhausted and
27 unexhausted claims. Because this court finds the petition should be dismissed as untimely, this
28 court does not reach the exhaustion issue.

1 **I. Legal Standards on Motion to Dismiss**

2 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
3 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
4 petitioner is not entitled to relief in the district court.” The Court of Appeals for the Ninth Circuit
5 construes a motion to dismiss a habeas petition as a request for the court to dismiss under Rule 4.
6 See O‘Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). Accordingly, the court will review
7 respondent’s motion to dismiss pursuant to its authority under Rule 4.

8 In ruling on a motion to dismiss, the court “must accept factual allegations in the [petition]
9 as true and construe the pleadings in the light most favorable to the non-moving party.” Fayer v.
10 Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011) (quoting Manzarek v. St. Paul Fire & Marine Ins.
11 Co., 519 F.3d 1025, 1030 (9th Cir. 2008)). In general, exhibits attached to a pleading are “part of
12 the pleading for all purposes.” Hartmann v. Cal. Dept. of Corr. and Rehab., 707 F.3d 1114, 1124
13 (9th Cir. 2013) (quoting Fed. R. Civ. P. 10(c)).

14 **II. Statute of Limitations**

15 **A. Legal Standards**

16 The habeas statute’s one-year statute of limitations provides:

17 A 1-year period of limitation shall apply to an application for a writ
18 of habeas corpus by a person in custody pursuant to the judgment of
19 a State court. The limitation period shall run from the latest of—

20 (A) the date on which the judgment became final by the
21 conclusion of direct review or the expiration of the time for
22 seeking such review;

23 (B) the date on which the impediment to filing an application
24 created by State action in violation of the Constitution or laws
25 of the United States is removed, if the applicant was
26 prevented from filing by such State action;

27 (C) the date on which the constitutional right asserted was
28 initially recognized by the Supreme Court, if the right has
29 been newly recognized by the Supreme Court and made
30 retroactively applicable to cases on collateral review; or

31 (D) the date on which the factual predicate of the claim or
32 claims presented could have been discovered through the
33 exercise of due diligence.

34 28 U.S.C. § 2244(d)(1).

1 Under subsection (d)(1)(A), the limitations period runs from the time a petition for
2 certiorari to the United States Supreme Court was due, or, if one was filed, from the final decision
3 by that court. Lawrence v. Florida, 549 U.S. 327, 339 (2007).

4 The limitations period is statutorily tolled during the time in which “a properly filed
5 application for State post-conviction or other collateral review with respect to the pertinent
6 judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). A state petition is “properly filed,” and
7 thus qualifies for statutory tolling, if “its delivery and acceptance are in compliance with the
8 applicable laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4, 8 (2000). “The period
9 between a California lower court’s denial of review and the filing of an original petition in a
10 higher court is tolled—because it is part of a single round of habeas relief—so long as the filing is
11 timely under California law.” Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) (citing Evans v.
12 Chavis, 546 U.S. 189, 191-93 (2006)); see also Carey v. Saffold, 536 U.S. 214, 216-17 (2002)
13 (Within California’s state collateral review system, a properly filed petition is considered
14 “pending” under section 2244(d)(2) during its pendency in the reviewing court as well as during
15 the interval between a lower state court’s decision and the filing of a petition in a higher court,
16 provided the latter is filed within a “reasonable time.”)

17 The limitations period may be equitably tolled if a petitioner establishes ““(1) that he has
18 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
19 way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v.
20 DiGuglielmo, 544 U.S. 408, 418 (2005)). An extraordinary circumstance must be more than
21 merely ““oversight, miscalculation or negligence on [the petitioner’s] part.”” Waldron-Ramsey v.
22 Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting Harris v. Carter, 515 F.3d 1051, 1055
23 (9th Cir. 2008)). Rather, petitioner must show that some ““external force” “stood in his way.” Id.
24 “The high threshold of extraordinary circumstances is necessary lest the exceptions swallow the
25 rule.” Lakey v. Hickman, 633 F.3d 782 (9th Cir. 2011) (citations and internal quotation marks
26 omitted).

27 In addition, the statute of limitations is subject to an actual innocence exception. A
28 petitioner may have his untimely-filed case heard on the merits if he can persuade the district

1 court that it is more likely than not that no reasonable juror would have convicted him.
2 McQuiggin v. Perkins, 569 U.S. 383, 400-01 (2013); Lee v. Lampert, 653 F.3d 929, 937 (9th Cir.
3 2011) (en banc). “Unexplained delay in presenting new evidence bears on the determination
4 whether the petitioner has made the requisite showing.” McQuiggin, 569 U.S. at 399. For
5 example, the “court may consider how the timing of the submission and the likely credibility of a
6 petitioner’s affiants bear on the probable reliability” of his evidence of innocence. Id.

7 **B. Discussion**

8 **1. The Petition is facially Untimely**

9 Petitioner had one year to file his federal petition from the date on which the judgment
10 became final by the conclusion of direct review, or the expiration of the time for seeking such
11 review. 28 U.S.C. § 2244(d)(1)(A).⁵ The California Supreme Court denied review on August 21,
12 2019. The state direct review process became “final” within the meaning of § 2244(d)(1)(A),
13 when the time for filing a petition for writ of certiorari expired ninety days later, on November
14 19, 2019. U.S. Sup. Ct. R. 13; Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). The one-year
15 limitation period commenced running the following day - November 20, 2019. Patterson v.
16 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)). Therefore, the last day
17 to file a federal petition was November 19, 2020.

18 Petitioner filed his federal habeas petition on January 23, 2022, outside the limitations
19 period.

20 **2. Statutory Tolling does not Render the Petition Timely**

21 The limitation period is tolled during the time a properly filed state petition is pending. 28
22 U.S.C. §2244(d)(2). A petition is “pending” until it has achieved final resolution through the
23 state’s postconviction procedures. Carey, 536 U.S. at 220. In California, a state habeas petition
24 remains pending between a lower court’s denial and the filing of a habeas petition in a higher
25 state court as long as that period is “reasonable” under state law. Evans, 546 U.S. at 191-92, 198;

26
27 ⁵ Petitioner does not contend, and this court finds no indication, that any of the other trigger dates
28 for commencement of the limitations period apply here. See 28 U.S.C. § 2244(d)(1)(B), (C), and
(D).

1 see Carey, 536 U.S. at 222 (unlike most states, which “specify precise time limits, such as 30 or
2 45 days, within which an appeal must be taken,” California “applies a general ‘reasonableness’
3 standard” when determining timeliness); Robinson v. Lewis, 9 Cal. 5th 883, 897 (2020)
4 (“California courts employ a reasonableness standard.”).

5 **a. State Law Timeliness Standards**

6 In determining reasonableness, California courts consider three factors. Robinson II, 9
7 Cal. 5th at 897.⁶ First, “a claim must be presented without substantial delay,” measured from the
8 time the petitioner . . . knew, or reasonably should have known, of the information offered in
9 support of the claim and the legal basis for the claim.” Id. at 898 (internal quotations and citation
10 omitted). Second, if the petition was filed with substantial delay, it may still be considered on the
11 merits if the “petitioner can demonstrate good cause for the delay.” Id. Third, even if the
12 petitioner cannot demonstrate good cause for a substantial delay, the petition may be considered
13 on the merits if it falls within one of four narrow exceptions, only three of which apply to
14 noncapital cases:

15 (1) that error of constitutional magnitude led to a trial that was so
16 fundamentally unfair that absent the error no reasonable judge or jury
17 would have convicted the petitioner; (2) that the petitioner is actually
18 innocent of the crime or crimes of which he or she was convicted;
19 and (3) that the petitioner was convicted or sentenced under an
20 invalid statute.

21 Id. (internal quotations and citation omitted).

22 The fact the California Court of Appeal and California Supreme Court did not expressly
23 deny petitioner’s claims on the grounds of untimeliness is not determinative of the timeliness
24 question for purposes of statutory tolling. See Evans, 546 U.S. at 194 (A federal court should not
25 presume that a California state court’s denial on the merits means that a petition was timely.).

26 ⁶ The California Supreme Court’s decision in Robinson (“Robinson II”) was the result of a
27 request by the Ninth Circuit Court of Appeals for certification on the following question: “what
28 constitutes a timely filing of a habeas corpus petition in state court?” Robinson v. Lewis, 795
F.3d 926 (9th Cir. 2015) (“Robinson I”). As a result of the California Supreme Court’s
explanation, the Ninth Circuit reversed a district court holding that Mr. Robinson was not entitled
to statutory tolling for 66 and 91-day gap intervals. Robinson v. Lewis, 824 F. App’x 494 (9th
Cir. 2020) (“Robinson III”).

1 When the timeliness of a federal habeas petition is at issue and the state courts have not indicated
2 whether the underlying claim was timely, “the federal court ‘must itself examine the delay in each
3 case and determine what the state courts would have held in respect to timeliness.’” Stewart v.
4 Cate, 757 F.3d 929, 935 (9th Cir. 2014) (quoting Evans, 546 U.S. at 198).

5 **(i) When is Delay “Substantial?”**

6 When determining whether a delay was substantial, the California Supreme Court created
7 a “safe harbor” period. A safe harbor lets petitioners “know that a claim presented to a higher
8 court within that time period will never be considered untimely due to that delay.” Robinson II, 9
9 Cal. 5th at 899. The Court first found that a safe harbor period of six months was unduly
10 generous, and “might endanger gap tolling in federal court” because the United States Supreme
11 Court had “observed that it did not ‘see how an unexplained delay of this magnitude [six months]
12 could fall within the scope of the federal statutory word ‘pending.’” Id. at 898 (quoting Evans,
13 546 U.S. at 201). The California Supreme Court noted that “[w]hatever difficulties a petitioner
14 might encounter in reasserting a claim already made in the lower court can usually be met in less
15 than six months.” Id. The Court went on to find that a safe harbor period of 120 days was
16 reasonable. Id. at 901. With that clarification, the Ninth Circuit held that when a claim is
17 presented within the 120-day safe harbor period, “there is no substantial delay and the ‘ordinary
18 state collateral review process is in continuance.’” Robinson III, 824 F. App’x at 497 (citation
19 omitted). Gap delay beyond this 120-day “safe harbor” is not “automatically ... considered
20 substantial delay” but is a “relevant factor for the court to consider as part of its overall
21 [timeliness] analysis.” Robinson II, 9 Cal. 5th at 902. “The petitioner bears the burden to plead
22 and then prove all of the relevant allegations.” Id. at 898.

23 **(ii) What Constitutes Good Cause for Substantial Delay?**

24 After establishing the safe harbor of 120 days, the California Supreme Court in Robinson
25 II stated that “delay beyond the specified time would be subject to the normal *Robbins* analysis.
26 That is, we would consider whether, under all of the circumstances, gap delay longer than 120
27 days constituted substantial delay and, if so, whether the petitioner demonstrated good cause for
28 the delay or an exception applied.” 9 Cal. 5th at 901 (citing In re Robbins, 18 Cal. 4th 770, 780

1 (1998), superseded on other grounds by In re Friend, 11 Cal. 5th 720 (2021).) In Robbins, the
 2 California Supreme Court noted that “[g]ood cause for substantial delay may be established if, for
 3 example, the petitioner can demonstrate that because he or she was conducting an ongoing
 4 investigation into at least one potentially meritorious claim, the petitioner delayed presentation of
 5 one or more other known claims in order to avoid the piecemeal presentation of claims.” 18 Cal.
 6 4th at 780 (emphasis omitted). The Court rejected the petitioner’s attempts to establish good
 7 cause: (1) allegations that petitioner was incarcerated in another state were conclusory; (2)
 8 petitioner failed to show that his mental illness affected reasonably competent counsel’s ability to
 9 file a timely petition; (3) counsel’s ignorance of their obligation to conduct an investigation to
 10 state claims was not reasonable; and (4) the petitioner failed to show the government in fact
 11 withheld information necessary to the petitioner’s claim.⁷ Id. at 807-10.

12 Since Robbins, California courts have found petitioners failed to establish good cause
 13 where: (1) their allegations are conclusory and/or vague, In re Gallego, 18 Cal. 4th 825 (1998);
 14 (2) their allegations are belied by evidence in the record, In re Reno, 55 Cal. 4th 428, 463 (2012)
 15 (petitioner’s statement that facts supporting the claim were unknown contradicted by evidence
 16 that they were known at the time of trial or the first habeas petition), superseded on other grounds
 17 by In re Friend, 11 Cal. 5th 720 (2021); (3) they failed to show due diligence in pursuing their
 18 claims, In re Clark, 5 Cal. 4th 750, 775 (1993) (“If a petitioner had reason to suspect that a basis
 19 for habeas corpus relief was available, but did nothing to promptly confirm those suspicions, that
 20 failure must be justified.”), superseded on other grounds by In re Friend, 11 Cal. 5th 720 (2021);
 21 and (4) they failed to show a mistaken belief about the law was reasonable, In re Douglas, 200
 22 Cal. App. 4th 236, 244 (2011).

23 California courts found good cause for a substantial delay where: (1) the petitioner’s
 24 counsel was unable to obtain funding to conduct an investigation, In re Sodersten, 146 Cal. App.
 25

26 ⁷ Robbins and many of the California cases citing it were capital cases. Therefore, most, if not all,
 27 of the petitioners had counsel. Not all of the arguments for good cause in those cases will be
 28 applicable in the present case, a non-capital case in which the petitioner is pro se. However, the
 general proposition that a petitioner must make more than general allegations of the reasons for
 delay are certainly applicable to a case with a pro se petitioner.

1 4th 1163, 1221 (2007); and (2) the petitioner had no way to know the legal basis for his claim
2 until informed by the prison, In re Brown, 45 Cal. App. 5th 699, 725 (2020), abrogated on other
3 grounds by In re Milton, 13 Cal. 5th 893, 515 P.3d 34 (2022).

4 A factor in determining good cause can be whether the petitioner has “substantially
5 rewritten” a habeas petition filed in a higher court following a lower court’s denial of the petition.
6 Osumi v. Giurbino, 445 F. Supp. 2d 1152, 1159 (C.D. Cal. 2006), aff’d, 312 F. App’x 23 (9th Cir.
7 2008); see also Davis v. Kibler, No. 2:21-CV-7620 FMO JDE, 2022 WL 2121907, at *5 (C.D.
8 Cal. Feb. 24, 2022), rep. and reco. adopted, 2022 WL 3012833 (C.D. Cal. May 31, 2022);
9 Warburton v. Walker, 548 F. Supp. 2d 835, 840 (C.D. Cal. 2008) (“[P]etitioner’s 69-day delay
10 between the Superior Court’s denial of his habeas corpus petition and petitioner’s subsequent
11 filing of his habeas corpus petition in the California Court of Appeal appears to be reasonable
12 since, after his unsuccessful petition to the Superior Court, petitioner refined his arguments and
13 provided further factual and legal support for his claims in his petition to the Court of Appeal.”);
14 Bui v. Hedgpeth, 516 F. Supp. 2d 1170, 1174–75 (C.D. Cal. 2007).

15 When examining the related question of equitable tolling, courts in the Ninth Circuit have
16 held that a petitioner who makes an adequate showing of good cause for a delay, may be entitled
17 to the opportunity to further develop the record. In Sossa v. Diaz, 729 F.3d 1225, 1236 (9th Cir.
18 2013), the petitioner made specific allegations that his delayed and/or denied requests for library
19 access and his problems with a broken photocopier for most of the three months he had to prepare
20 an amended petition caused him to file two days beyond a deadline. The court found these
21 allegations sufficient to require further factual development and remanded the issue to the district
22 court on that basis. 729 F.3d at 1237. In Laws v. Lamarque, 351 F.3d 919, 924 (9th Cir. 2003),
23 the Ninth Circuit held that the petitioner’s allegations of mental incompetency and records
24 showing his severe mental illness were sufficient to justify further factual development of the
25 petitioner’s claim that he was entitled to equitable tolling. In general, specific allegations,
26 supported by evidence, showing a cause for delay justified further factual development. See
27 Cook v. Pfier, No. 2:21-cv-2252 SVW AFM, 2021 WL 8822033, at *2, 3 (C.D. Cal. Sept. 10,
28 2021) (petitioner’s allegation that delay caused by counsel’s failure to notify him that the state

1 court denied his appeal was supported by evidence, “including emails, appellate counsel’s
2 declaration, and mail logs,” and sufficient to justify factual development).

3 **(iii) Exceptions to Timeliness Requirement**

4 As described above, California case law sets out three exceptions to the timeliness
5 requirement which could be applicable in this case: (1) a trial so fundamentally unfair that absent
6 the error no reasonable jury could have convicted the petitioner; (2) actual innocence; and (3)
7 conviction under an invalid statute. The first exception is “narrow” and the petitioner’s claim
8 must “point unerringly to innocence or reduced culpability.” Reno, 55 Cal. 4th at 474 (quoting
9 Clark, 5 Cal. 4th at 797 n. 32). A petitioner could meet the actual innocence exception by
10 “offer[ing] newly discovered, irrefutable evidence of innocence of the offense or degree of
11 offense of which the petitioner was convicted.” Clark, 5 Cal. 4th at 797 n. 33.

12 **b. Gaps Between State Court Filings in this Case**

13 Before considering whether petitioner is entitled to tolling for the intervals between his
14 state court filings, this court notes that the limitations clock ran between the California Supreme
15 Court’s denial of petitioner’s habeas petition and his filing in this court.⁸ The clock thus ran from
16 October 14, 2021 to January 23, 2022 – a total of 101 days. That leaves petitioner with 264 days
17 in the one-year limitations period. Any gap time that does not toll the statute of limitations may
18 not, then, exceed 264 days if the federal petition is to be considered timely.

19 **(i) First State Habeas Petition**

20 The first state petition was filed in the Superior Court on August 25, 2019, but the
21 limitation period did not commence until November 20, 2019, after direct review was final. The
22 parties do not dispute that the limitation clock stopped for the time period of November 20, 2019,

23 ⁸ Petitioner filed a subsequent petition in the superior court. He does not argue that the pendency
24 of that petition should count toward tolling the statute of limitations. Even if he did, that
25 argument would fail because petitioner was not then working his way “up the ladder” to
“complete[] a full round of collateral review.” Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir.
26 2003); see Nino v. Galaza, 183 F.3d 1003, 1005 (1999) (The limitations period only remains
27 tolled during the intervals between the state court’s denial and the filing of a petition “at the next
28 state appellate level.”). Further, even if it did count, the limitations clock would only be tolled for
a very short period of time. Petitioner filed that superior court petition on January 21, 2022, just
two days before he filed his federal petition on January 23.

1 the date the statute of limitation commenced, to January 13, 2020, the date the Superior Court
2 denied petitioner's motion for reconsideration of the denial of the first state petition.

3 **(ii) Second State Habeas Petition**

4 After the Superior Court's denial of the motion for reconsideration, the first day petitioner
5 could have filed his second petition in the California Court of Appeal was January 14, 2020.
6 Petitioner filed it 233 days later, on September 3, 2020. Respondent argues that the 233-day time
7 period was unreasonable and did not toll the statute.

8 Under Robinson II, the first question to determine whether the intervals between state
9 court filings qualify as statutory tolling is whether these intervals were "substantial." Robinson
10 II, 9 Cal. 5th at 898. The 233-day time gap is significantly longer than the 120 days deemed
11 presumptively reasonable. It even exceeds the six-month (180-day) period rejected by the
12 California Supreme Court as a safe harbor. Nothing in the record mitigates a finding that the
13 delay was substantial. See Moore v. Pollard, No. CV 19-7771-MCS (JPR), 2022 WL 2079722, at
14 *8 (C.D. Cal. Mar. 23, 2022), rep. and reco. adopted, 2022 WL 1591692 (C.D. Cal. May 19,
15 2022) (302-day delay was substantial under Robinson II); Clarke v. Matteson, No. 2:20-cv-
16 06299-VAP (SP), 2021 WL 6693711, at *5 (C.D. Cal. Sept. 8, 2021) (191-day delay substantial),
17 rep. and reco. adopted, 2022 WL 228151 (C.D. Cal. Jan. 25, 2022); Manley v. Davey, No. 2:17-
18 cv-2686-TLN-DMC-P, 2021 WL 1102724, at *8 (E.D. Cal. Mar. 23, 2021) ("nearly five months"
19 between filings substantial), rep. and reco. adopted, 2021 WL 2805645 (E.D. Cal. July 6, 2021);
20 cf. Evans v. Chavis, 546 U.S. 189, 201 (2006) (in case decided prior to California Supreme Court
21 decision in Robinson II, U.S. Supreme Court held that an unexplained, and hence unjustified, six-
22 month filing delay not reasonable under state law).

23 Petitioner does not argue to the contrary. (See ECF No. 22 at 1 (Petitioner "agrees" "that
24 an exceptional amount of time passed between each filing.").) Petitioner's delay in filing his
25 second state petition was thus unreasonable unless he can show good cause for the delay or that
26 his claims fall under one of the narrow exceptions set out in Robinson II. Robinson II, 9 Cal. 5th
27 at 898.

28 ////

1 While petitioner does not explicitly argue good cause under Robinson II, his arguments that
2 he should be entitled to equitable tolling are essentially attempts to show good cause. This court
3 considers those arguments here.

4 According to petitioner, prison shut-downs and postal delays caused by the COVID-19
5 pandemic affected his ability to conduct legal research and send and receive mail. Petitioner
6 makes the following contentions regarding the effect of prison shut-downs:

- 7 • There were “constant periods of quarantine for weeks, if not months, at a time.”
- 8 • Starting in February 2020, inmates could only leave their cells for five-minute periods
9 of time every fourth day to shower.
- 10 • For thirty months during the pandemic, prisoners did not have physical access to the
11 law library. Just recently they regained access, and then only “on a very limited
12 basis.”
- 13 • Petitioner had “zero physical access to conduct research and copying” at “critical
14 times” between and during filing petitions.
- 15 • Petitioner lacked access to “any legal forms or files.”

16 Petitioner also alleges his ability to send and receive mail was affected:

- 17 • Both the U.S. Postal Service and the prison’s mailroom experienced delays.
- 18 • “Sometimes mail would take more than six-months from the postmark date to arrive
19 to the inmate.”
- 20 • Because he lacked law library access, petitioner mailed forms that required copying
21 to his mother.
- 22 • Sometimes, petitioner had to wait for forms his mother printed and mailed to him.
- 23 • On December 6, 2020, petitioner was moved from C-yard to a quarantine area in the
24 B-yard gym because he tested positive for COVID-19. His mail was even more
25 delayed during that time because it had to be re-routed for delivery in his new area.
26 When petitioner was returned to his cell on December 16, “any mail that might have
27 possibly been rerouted to the B-yard gym would again have to be returned to the
28 mailroom for another reroute.” Rerouted mail was not prioritized.

1 • In March 2021, petitioner was again moved to a quarantine area for four days which
2 was “yet another cause for delay in the petitioner’s otherwise diligent pursuit of his
3 case.”

4 With respect to mail delays, petitioner makes only very general arguments. He fails to
5 allege specific facts showing that he experienced any significant delay, or, for that matter, any
6 delay, in sending or receiving mail. The only mail petitioner mentions are documents sent to and
7 from his mother. However, petitioner fails to allege that any of those mailings were, in fact,
8 delayed. Moreover, petitioner’s contentions regarding mail delay while he was quarantined are
9 not relevant to the gap before his second petition. Petitioner filed the second petition on
10 September 3, 2020. He claims he was first quarantined in December 2020. Petitioner’s
11 contention that he was unable to prepare his second state court petition due to mail delays is
12 unsupported.

13 With respect to prison shutdowns, this court also finds petitioner’s contentions
14 insufficiently specific. Petitioner claims he had no physical access to the law library but does not
15 explain what, if any, other kinds of access he had to the library, why those other types of access
16 were insufficient, why he required law library access to complete his petitions, or what efforts he
17 made to counter the alleged deprivation of library access. Cf. Foster v. Cate, No. 11-CV-2270-
18 LAB WMC, 2013 WL 4544337, at *10 (S.D. Cal. Aug. 26, 2013) (In considering equitable
19 tolling, the court concluded, “[w]ithout specific information regarding the duration of the alleged
20 deprivation, Petitioner's diligent efforts to counter that alleged deprivation, or the necessity of the
21 withheld documents, this Court can only conclude it was Petitioner's lack of diligence, and not
22 external factors, that caused Petitioner's delay.”). Respondent presents a copy of the CDCR
23 Departmental Operations Manual which provides that an inmate who is unable to physically
24 access the law library “may request access to legal material through delivery of those materials to
25 the inmate by library staff. This process is referred to as law library paging.” (ECF No. 25-1.)
26 While that evidence does not show a paging system was, in fact, available to petitioner, it does
27 lend some support to this court’s conclusion that to show diligence, petitioner must explain why
28 other methods of obtaining legal materials were either unavailable or excessively time-

1 consuming. Similarly, with respect to his alleged lack of access to forms, petitioner does not
2 explain what he did to try to get the necessary forms.

3 With respect to the work involved in preparing his appellate court petition, this court finds
4 some differences between petitioner's superior court and appellate court petitions. (Compare
5 ECF No. 13-5 with ECF No. 13-9.) First, while petitioner's description of his shackling claim in
6 both courts is nearly identical, in his appellate court petition he added a declaration from a
7 witness and two new citations to legal authority. In support of the second petition's challenge to
8 testimony at the Evidence Code § 402 hearing, petitioner added several exhibits. Petitioner also
9 added a claim of ineffective assistance of appellate counsel in his second petition. In addition,
10 while he did not re-state his claim regarding the lack of DNA testing, he did move the Court of
11 Appeal to be permitted to conduct such testing.

12 These differences between petitioner's first and second state petitions are not
13 insubstantial. They reflect that petitioner spent time collecting documents and conducting
14 research. However, the fact petitioner spent time preparing his second petition is not good cause
15 on its own. Petitioner fails to explain how much time he spent, just what specific hurdles he
16 actually faced, or how those hurdles account for the delay. Petitioner does not show that he
17 required well over seven months to prepare his second petition.

18 This court does not doubt that lockdowns and restrictions on prisoner movement instituted
19 due to the COVID-19 pandemic made preparation of legal filings difficult. That said, this court
20 may not simply assume those difficulties were so severe that a reasonably diligent prisoner could
21 not file a reasonably timely pleading. Petitioner does nothing to show he was reasonably diligent
22 in preparing his second petition. This court finds that he has not demonstrated good cause for the
23 interval between his first and second petitions nor has he made a showing sufficient to justify
24 further development of the record on the issue.

25 **(iii) Third State Habeas Petition**

26 The Court of Appeal denied petitioner's second petition on September 13, 2020.
27 Petitioner filed his third petition in the California Supreme Court on July 21, 2021, 306 days later.
28 ////

1 As described above, petitioner’s general arguments regarding prison shutdowns and
2 delays in mail do not provide any basis for a finding of good cause. In addition, petitioner’s
3 quarantines were relatively brief – totaling only fourteen days. While it is reasonable to think
4 petitioner had difficulty preparing his third petition while there, that still left him 292 days, well
5 over nine months, preparation time.

6 Further, there is no basis to find that petitioner's third petition required a good deal of
7 work. This court finds virtually no differences between the petition filed in the Court of Appeal
8 and that filed in the California Supreme Court. (Compare ECF No. 13-9 with ECF No. 13-11.)
9 The only substantive difference appears to be that petitioner included one or two additional case
10 citations in the petition to the Supreme Court.

11 Petitioner fails to allege facts sufficient to show good cause for his delay in filing his third
12 petition or to justify evidentiary development of the issue. The next question, then, is whether
13 petitioner makes allegations, through his petition or otherwise, sufficient to show that he does, or
14 can, meet one of the three exceptions to the timeliness bar. See *Robinson II*, 9 Cal. 5th at 898.

(iv) Petitioner does not Show Exceptions to Untimeliness

16 Petitioner does not allege facts to support any of the three exceptions identified in
17 Robinson II. Again, they are: (1) a trial so fundamentally unfair that absent the error no
18 reasonable jury could have convicted the petitioner; (2) actual innocence; and (3) conviction
19 under an invalid statute.

20 With respect to the first exception, none of petitioner’s claims amount to an “error of
21 constitutional magnitude [that] led to a trial that was so fundamentally unfair that absent the error
22 no reasonable judge or jury would have convicted the petitioner.” Robinson II, 9 Cal. 5th at 898.
23 “[T]o qualify under this narrow exception, the claim must be such that it would ‘undermine the
24 entire prosecution case and point unerringly to innocence or reduced culpability.’” Reno, 55 Cal.
25 4th at 474 (quoting Clark, 5 Cal. 4th at 797, n. 32). For example, if a petitioner claimed that he
26 was denied the right to present evidence at trial, he ““would have to persuade the court that had
27 the excluded evidence been presented, he would have been acquitted or convicted of a lesser

28 |||

1 offense.”” Clark, 5 Cal. 4th at 797, n. 32 (quoting People v. Gonzalez, 51 Cal.3d 1179, 1246
2 (1990)).

3 The Court of Appeal summarized the facts presented at trial, primarily as they related to
4 petitioner’s claims that the trial court erred in excluding evidence of the potential punishment for
5 sex offenses depending on the victim’s age. In brief, petitioner was convicted of sexual
6 misconduct with the son of a close friend. The victim testified at trial regarding the abuse. It
7 appears that members of the victim’s family, who “discovered” petitioner and the victim having
8 sex together, also testified.

9 Petitioner raises four claims here. First, he contends that his trial was unfair because
10 jurors would have been prejudiced when they saw him in the hallway before trial in shackles.
11 Second, petitioner contends the victim’s clothing and bedding should have been tested for DNA.
12 He states that such evidence was “potentially exculpatory.” Third, petitioner alleges his trial
13 counsel was constitutionally ineffective when they failed to introduce expert testimony regarding
14 the effects of Adderall on the victim at a pretrial hearing. He complains that trial counsel allowed
15 the court to hear only the testimony of the victim about those effects. As a result of the hearing,
16 the trial court ruled that the defense could not present evidence about the victim’s use of Adderall.
17 Fourth, petitioner contends his appellate counsel were constitutionally ineffective when they
18 failed to raise the shackling claim on appeal. Petitioner contends counsel told him to raise the
19 issue in a habeas petition. He argues this was unreasonable because he does not have the
20 resources that an attorney would have to conduct an investigation to support the claim.

21 Petitioner does not explain how any of the claims point to his innocence or reduced
22 culpability. Rather than demonstrating innocence, petitioner contends he was prejudiced by
23 shackling and by the lack of expert testimony at the pretrial hearing. Further, the fact that DNA
24 evidence may have been “potentially” exculpatory is certainly not a showing that jurors would
25 have convicted petitioner of a lesser offense or acquitted him if DNA testing had been conducted.

26 With respect to the second exception to the state’s timeliness bar, petitioner does not
27 allege facts sufficient to demonstrate that he is “actually innocent” of the crimes nor does he ever
28

1 allege that he is.⁹ Finally, in none of petitioner's claims does he contend that he was convicted or
2 sentenced under an invalid statute.

3 **c. Conclusion re Statutory Tolling**

4 Petitioner fails to show good cause for the substantial gaps between his first, second, and
5 third state petitions. Nor does he meet any of the exceptions to the state's timeliness requirement.
6 Petitioner is thus not entitled to statutory tolling of the 365-day limitations period for those
7 intervals. The limitations clock ran for 101 days between the California Supreme Court's denial
8 of petitioner's third habeas petition and the date he filed the present federal petition. Petitioner's
9 federal petition was only timely if the limitations clock was not running for more than the 264
10 days remaining in the one-year limitations period. The 306-day interval between petitioner's
11 second and third state petitions easily surpasses that mark. When the 233-day interval between
12 petitioner's first and second petitions is also considered, the untolled time between the end of
13 direct review and petitioner's filing in this court totals 640 days.¹⁰ Statutory tolling does not
14 render the petition timely.

15 **3. Petitioner is not Entitled to Equitable Tolling**

16 A habeas petitioner is entitled to equitable tolling of the one-year statute of limitations
17 only if the petitioner shows: ““(1) that he has been pursuing his rights diligently, and (2) that
18 some extraordinary circumstance stood in his way’ and prevented timely filing.” Holland v.
19 Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).
20 “For a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first
21 element required for equitable tolling, he must show that he has been reasonably diligent in

22 ⁹ Because petitioner fails to make any argument or showing of actual innocence, he is also not
23 eligible for the federal exception to timeliness on that basis. Only a “colorable claim of factual
24 innocence” will support the actual innocence exception. Schlup v. Delo, 513 U.S. 298 (1995).
25 This exception is concerned with actual, as opposed to legal, innocence and must be based on
26 reliable evidence not presented at trial. Id. at 327; Calderon v. Thompson, 523 U.S. 538, 559
27 (1998).

28 ¹⁰ This figure accounts for the 233 days in the first gap between denial of the first state habeas
29 petition and filing the second petition, the 306-day second gap interval, and the 101 days between
30 the California Supreme Court's denial of petitioner's third habeas petition and the date he filed
31 the federal petition here.

1 pursuing his rights not only while an impediment to filing caused by an extraordinary
2 circumstance existed, but before and after as well, up to the time of filing his claim in federal
3 court.” Smith v. Davis, 953 F.3d 582, 598-99 (9th Cir. 2020) (en banc) (internal quotation marks
4 and citation omitted). In other words, “[w]hen external forces, rather than a petitioner’s lack of
5 diligence, account for the failure to file a timely claim, equitable tolling of the statute of
6 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (citations
7 omitted). “The diligence required for equitable tolling purposes is ‘reasonable diligence,’ not
8 ‘maximum feasible diligence.’” Holland, 560 U.S. at 653 (internal citations and some quotation
9 marks omitted).

10 Extraordinary circumstances need not be an “actual impossibility; rather, equitable tolling
11 is appropriate where ‘it would have technically been possible for a prisoner to file a petition, but a
12 prisoner would have likely been unable to do so.’” Grant v. Swarthout, 862 F.3d 914, 918 (9th
13 Cir. 2017) (emphasis omitted) (quoting Gibbs v. Legrand, 767 F.3d 879, 888 (9th Cir. 2014)).
14 That said, equitable tolling should be applied sparingly. See Waldron-Ramsey v. Pacholke, 556
15 F.3d 1008, 1011 (9th Cir. 2009) (“To apply the doctrine in “extraordinary circumstances”
16 necessarily suggests the doctrine’s rarity”).

17 Petitioner bears the burden of alleging facts that would give rise to tolling, Pace, 544 U.S.
18 at 418, and “[a] habeas petitioner ... should receive an evidentiary hearing when he makes ‘a
19 good-faith allegation that would, if true, entitle him to equitable tolling,’” Roy v. Lampert, 465
20 F.3d 964, 969 (9th Cir. 2006) (quoting Laws v. Lamarque, 351 F.3d 919, 921 (9th Cir. 2003)).

21 Courts in this circuit have considered claims like petitioner’s that lockdowns and mail
22 interruptions caused by the COVID-19 pandemic prevented timely filing of state habeas petitions.
23 Where, like petitioner in the present case, the petitioners made only general allegations about the
24 effects of lockdowns and failed to show they had diligently pursued their rights, courts found
25 those allegations insufficient to justify the application of equitable tolling.

26 Although Petitioner asserts that the prison where he was confined has
27 “virtually been on a limited movement and otherwise ‘lockdown’
28 since the beginning of COVID” he does not provide any information
regarding how long the prison law library was closed or state whether
he attempted to access the library at any time before the statute of

1 limitations expired on December 6, 2021. He also does not specify
 2 how long he was deprived of his legal materials. Nor does he explain
 3 how his lack of law library access prevented him from preparing and
 4 filing the Petition. Without any supporting details or documentation,
 5 Petitioner's generalized allegations are too conclusory to warrant
 6 equitable tolling. *See Davis v. Kibler*, No. 2:21-cv-07620-FMO-JDE,
 7 2022 WL 2121907, at *6, 2022 U.S. Dist. LEXIS 97273, at *19 (C.D.
 8 Cal. Feb. 24, 2022) ("Petitioner did not provide a specific
 9 explanation as to how COVID-19 hindered his ability to timely file
 10 his federal petition. While he alleges general difficulties in accessing
 11 the prison library during COVID-19 lockdowns, Petitioner fails to
 12 provide specific facts to show that lack of access to the library
 13 'actually prevented' him from timely filing his federal petition.");
Dragasits v. Covello, No. 3:21-cv-1459-CAB-MDD, 2022 WL
 207730 at *7, 2022 U.S. Dist. LEXIS 12747 at *19 (S.D. Cal. Jan.
 24, 2022) ("[G]eneral claims of prison lockdowns and lack of access
 to the prison law library as a result of the COVID-19 pandemic alone
 are insufficient amount to the 'extraordinary circumstances' required
 to entitle an inmate to equitable tolling."); *see generally Robinson v.
 Marshall*, 405 F. App'x 241, 242 (9th Cir. 2010) ("[Petitioner]
 contends that he is entitled to equitable tolling based on his inability
 to access the law library during extended prison lockdowns. This
 contention fails because [petitioner] did not demonstrate how limited
 access to the library was the cause of his failure to timely file his
 petition.").

14 Cervantes v. Cisneros, No. 2:22-cv-0367-SSS-MAA, 2022 WL 4082488, at *5 (C.D. Cal. July
 15 28, 2022), rep. and reco. adopted, 2022 WL 4088064 (C.D. Cal. Sept. 6, 2022); see also Edgin v.
 16 Covello, No. 20-cv-07565-JD, 2021 WL 4355333, at *4-5 (N.D. Cal. Sept. 24, 2021) (petitioner's
 17 unsupported allegations concerning COVID-19's effect on his access to law library and outgoing
 18 and incoming mail were insufficient to warrant equitable tolling).

19 For the reasons set out in the prior discussion, petitioner's general descriptions about the
 20 effects of the COVID-19 pandemic are insufficient to demonstrate that he was diligent in
 21 preparing and filing his state habeas petitions. Therefore, he is not entitled to equitable tolling of
 22 the statute of limitations.

23 **II. Exhaustion/Motion to Stay/Motion for DNA Testing**

24 Petitioner admits his claim 2 is unexhausted. (See ECF No. 22 at 4-5.) He seeks a stay of
 25 these proceedings to permit the state courts to resolve his pending state habeas petition raising
 26 that claim. (Id.; ECF No. 16.) Because this court finds above that the petition should be
 27 dismissed as untimely, whether or not petitioner exhausted a claim is a moot inquiry. This court
 28 need not, and does not, address the exhaustion issue or the related stay issue. For the same

1 reason, this court need not consider petitioner's motion for DNA testing.

2 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

3 1. Respondent's motion to dismiss (ECF No. 11) be granted on the grounds that the
4 petition is untimely; and

5 2. Petitioner's motion to stay (ECF No. 16) and request for DNA testing (ECF No. 18) be
6 denied as moot.

7 These findings and recommendations will be submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after
9 being served with these findings and recommendations, any party may file written objections with
10 the court and serve a copy on all parties. The document should be captioned "Objections to
11 Magistrate Judge's Findings and Recommendations." Any response to the objections shall be
12 filed and served within seven days after service of the objections. The parties are advised that
13 failure to file objections within the specified time may result in waiver of the right to appeal the
14 district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In the objections, the
15 party may address whether a certificate of appealability should issue in the event an appeal of the
16 judgment in this case is filed. See Rule 11, Rules Governing § 2254 Cases (the district court must
17 issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

18 Dated: November 2, 2022



19
20 DEBORAH BARNES
21 UNITED STATES MAGISTRATE JUDGE
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23 DLB:9
24 DB Prisoner Inbox/Habeas/S/purt0199.mtd fr
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